

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

HARBORVIEW FELLOWSHIP, a  
Washington non-profit corporation,

Plaintiff,

v.

JAY INSLEE, Governor, in his official  
capacity, SECRETARY OF HEALTH  
UMAIR A. SHAH,<sup>1</sup> in his official  
capacity, ROBERT FERGUSON, in his  
official capacity as Attorney General of  
Washington, PAUL PASTOR, in his  
official capacity as Pierce County  
Sheriff, and ANTHONY L-T CHEN, in  
his official capacity as Director of  
Health Tacoma-Pierce County Health  
Department,

Defendants.

CASE NO. 3:20-cv-05518-RJB

ORDER GRANTING MOTION TO  
DISMISS

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<sup>1</sup> Dr. Umair A. Shah was appointed Washington State Secretary of Health on December 21, 2020. Pursuant to Fed. R. Civ. P. 25(d), Dr. Shah should be substituted for the former Secretary of Health, Dr. John Wiesman as a defendant and the caption should be amended to reflect this change.

1 This matter comes before the Court on Defendants Washington State Governor Jay  
2 Inslee, Washington State Secretary of Health Umair A. Shah, and Attorney General Robert  
3 Ferguson's Motion to Dismiss. Dkt. 76. The Court has considered the pleadings filed regarding  
4 the motion and the remaining file.

5 In this case, the Plaintiff, a nondenominational church in Pierce County, Washington,  
6 challenges portions of the Washington State "Safe Start Reopening Plan" entitled "Phase 1 and 2  
7 Religious and Faith-Based Organizations Covid-19 Requirements" which were instituted in  
8 response to the COVID-19 pandemic. Dkt. 1.

9 Governor Inslee, Secretary of Health Shah, and Attorney General Ferguson, sued in their  
10 official capacities, moving for dismissal of the claims asserted against them pursuant to Fed. R.  
11 Civ. P. 12(b)(1). For the reasons provided below, their motion (Dkt. 76) should be granted, the  
12 claims against them dismissed without prejudice, and the case closed.

13 The Defendants move for dismissal of this case for lack of subject matter jurisdiction by  
14 making both a facial attack on the allegations in the Second Amended Complaint and by  
15 attacking the factual basis of some of those allegations. Accordingly, the Court can consider  
16 evidence outside the Second Amended Complaint in resolving whether it has jurisdiction without  
17 converting the motion into a motion for summary judgment. *Safe Air for Everyone v. Meyer*,  
18 373 F.3d 1035, 1039 (9th Cir. 2004).

### 19 I. **FACTS AND PROCEDURAL HISTORY**

20 On January 21, 2020, what was thought to be the first case of COVID-19 in the United  
21 States was diagnosed in the State of Washington. Dkt. 23. COVID-19 is caused by the SARS-  
22 CoV-2 virus, which, at the time was a novel coronavirus – it had not been identified in humans  
23 prior to December 2019. *Id.* On February 29, 2020, Washington State Governor Inslee declared  
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1 a state of emergency and then issued several proclamations over the next few months to attempt  
2 to slow the spread of COVID-19. On March 23, 2020, Governor Inslee issued Proclamation 20-  
3 25, “Stay Home, Stay Safe” which prohibited Washingtonians from leaving their homes except  
4 for essential activities and essential employment. After Washington made progress in slowing  
5 the spread of the disease, on May 4, 2020, Governor Inslee issued Proclamation 20-25.3, “Safe  
6 Start Reopening Plan,” which was a four-phased reopening plan. Included in the Safe Start  
7 Reopening Plan was “Phase 1 and 2 Religious and Faith-Based Organizations Covid-19  
8 Requirements” (“Religious Organizations Requirements”), portions of which are the subject of  
9 this lawsuit. Dkt. 24-1, at 106. By late May, 2020, Pierce County, where Plaintiff is situated,  
10 was in Phase two of the reopening plan; under the Religious Organizations Requirements, it was  
11 allowed up to 100 persons to participate in outdoor religious services and for indoor services, up  
12 25% of the building’s capacity or 50 people, whichever is fewer. *Id.*

13 On June 1, 2020 the Plaintiff filed this case against Governor Jay Inslee and former  
14 Washington Secretary of Health John Wiesman asserting that the Religious Organizations  
15 Requirements violated its First and Fourteenth Amendment rights under the U.S. constitution via  
16 42 U.S.C. § 1983, and the Washington State Constitution. Dkt. 1. The First Amended  
17 Complaint added Washington’s Attorney General Robert Ferguson as a Defendant. Dkt. 27.

18 On June 18, 2020, the Religious Organizations Requirements were updated for counties  
19 in Phase 2, (like Pierce County) allowing outdoor services of up to 100 persons and indoor  
20 services of 25% of building capacity or 200 persons, whichever was smaller. Dkt. 41-1. Later  
21 that day (June 18, 2020) the Plaintiff’s motion for a temporary restraining order was denied.  
22 Dkt. 42. On June 23, 2020 and again on July 24, 2020, the Sec. of Health issued orders  
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1 requiring, with some exceptions, that masks be worn in indoor public spaces and outdoor spaces  
2 where social distancing could not be maintained. Dkt. 85-1, at 2-5.

3 The Plaintiff moved for and was granted leave to file a second amended complaint. Dkt.  
4 52. Plaintiff filed the Second Amended Complaint on August 21, 2020 and added Pierce County  
5 Washington Sheriff Paul Pastor and Dr. Anthony L-T Chen, head of the Tacoma-Pierce County  
6 Health Department, as Defendants. Dkt. 53. Dr. Chen's motion to dismiss was granted on  
7 December 9, 2020 (Dkt. 72) and Sheriff Pastor's motion to dismiss was granted on December 21,  
8 2020 (Dkt. 75).

9 The Second Amended Complaint alleges that on August 10, 2020, the Religious  
10 Organizations Requirements were amended to allow 200 people for outdoor services and to  
11 require that all parties, including those leading services, wear a mask. Dkt. 53. It maintains that  
12 unlike business, religious organizations were still subject to the 25% capacity or 200-person  
13 caps, whichever was less, for indoor services. *Id.* The Second Amended Complaint alleges that  
14 under the reopening guidance at the time, offices, restaurants, and taverns in Phase 2 were  
15 allowed occupancy of 50% of their building capacity and did not face any per person caps. *Id.*  
16 The Second Amended Complaint asserts that, unlike presenters at religious functions, under the  
17 Safe Start Reopening Plan, diners in restaurants and reporters (while speaking) were permitted to  
18 remove their masks in public. *Id.*, at 17. The Second Amended Complaint also asserts that  
19 religious organizations were subject to 15 additional requirements. *Id.*

20 The Second Amended Complaint alleges that the church has around 250 – 325 people  
21 that attend their service on Sunday. Dkt. 53, at 10. It asserts that its sanctuary can seat 475  
22 people, and has classrooms, meeting rooms and offices which can accommodate around an  
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1 additional 107 socially-distanced people. *Id.* The Second Amended Complaint alleges that  
2 worshipping as a group is a core tenant of the church's beliefs. *Id.*, at 10-11. It also asserts that  
3 "individuals leading the service have not worn masks while leading worship, preaching, or  
4 giving announcements" as required by the Religious Organizations Requirements and maintains  
5 that "[w]earing masks while leading the service would materially interfere with individuals'  
6 ability to communicate and be understood by worshipers (whether in-person or viewing a service  
7 streamed over the Internet)." *Id.*, at 14.

8 The Second Amended Complaint asserts claims for violations of the first amendment to  
9 the U.S. constitution's protections of freedom of religion and speech. Dkt. 53. It seeks  
10 declaratory and injunctive relief as well as "judgment for all damages authorized under federal  
11 law, including under 42 U.S.C. § 1983," and attorneys' fees and costs. *Id.*

12 In the fall and winter of 2020, the State of Washington, like every other state in the  
13 country, experienced a substantial rise in Covid-19 cases followed by an increase in  
14 hospitalizations. Wash. Dep't of Health, COVID-19 Data Dashboard, Epidemiological Curves  
15 [www.doh.wa.gov/Emergencies/COVID19/DataDashboard](http://www.doh.wa.gov/Emergencies/COVID19/DataDashboard) (updated Feb. 17, 2021).

16 On November 17, 2020, due to the rise in cases, the Governor suspended the Safe Start  
17 Reopening Plan and additional restrictions were imposed on individuals, businesses and other  
18 entities. Dkt. 77. On December 8, 2020, the Governor issued proclamation 20-25.9 which  
19 continued to allow indoor religious services at 25% of building capacity or 200 people,  
20 whichever was fewer, and required attendees were required to wear masks. Dkt. 77-1, at 5.  
21 There was no restriction on outdoor services. *Id.* Bars, restaurants, gyms were closed for indoor  
22 services, and other entities, like stores and offices were limited to 25% of building capacity. *Id.*

1 According to the Plaintiff's senior pastor, on December 14, 2020, he received a voicemail  
2 from Jean Frost of the Washington Department of Health, informing him that the Department of  
3 Health had received complaints that some individuals at the church were not wearing face  
4 coverings, not social distancing, or that they were over the capacity limits. Dkt. 83, at 2. The  
5 pastor returned her call and asked that she send him an email about the issue. *Id.* Her email,  
6 dated December 16, 2020, "Spiritual and Faith Based Services – Violation Governor's  
7 Proclamation" provided:

8 Good Morning,

9 The Department of Health recently received communication through  
10 Coronavirus.wa.gov (Report a Safe Start Violation) that some individuals in your  
11 establishment are not wearing face coverings, not social distancing, or that you  
12 are over the capacity requirements as outlined in the "Safe Start" reopening plan.

13 This letter is a courtesy. If we receive future complaints, we will contact you by  
14 phone and provide technical assistance. Below is a variety of resources you can  
15 use to ensure the safety of your community.

16 Dkt. 83-1, at 1. The email then provides several website links including to the Religious  
17 Organizations Requirements, the Safe Start Reopening Plan, "frequently asked questions" on the  
18 Governor's reopening plan, the Department of Health's website, including "resources and  
19 recommendations" and information on statewide face covering requirements. *Id.*, at 1-2.

20 According to Ms. Frost, since August of 2020, she has contacted 162 houses of worship  
21 about complaints and offered technical assistance to help them come into compliance with the  
22 state's COVID-19 requirements. Dkt. 86, at 2. Other than offering technical assistance, both she  
23 and Kelly Cooper, the Department of Health's Policy and Legislative Director, state that the  
24 Department of Health has a policy that it takes no further action (including referrals to law  
enforcement, prosecuting attorney, or other governmental authority for civil prosecution) against  
religious organizations who refuse to comply. Dkts. 85 and 86, at 2-3. They maintain that the

1 Department of Health focuses only on voluntary compliance with religious organizations. *Id.*  
2 According to Director Kelly, the Department of Health bases its decision on whether to take  
3 further action based on the entity involved. Dkt. 85. For example, if the non-complying entity  
4 was a healthcare provider, the Department of Health “may open an investigation and potentially  
5 take enforcement action.” *Id.*

6 On December 21, 2020, after the U.S. Supreme Court’s decision in *Roman Catholic*  
7 *Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) and the Ninth Circuit Court of Appeals  
8 decision in *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1234 (9th Cir. 2020), the  
9 Governor issued proclamation 20-25.10. Dkt. 71, at 9-14. As is relevant here, that proclamation  
10 made the 200-person cap on indoor services advisory only and retained the 25% building  
11 capacity requirements. *Id.*, at 12.

12 On January 5, 2021, the Governor announced a new phased reopening plan called  
13 “Healthy Washington – Roadmap to Recovery.” Dkt. 77-1, at 30-33. On January 11, 2021, the  
14 Religious Organizations Requirements were updated, to include the requirement that face  
15 coverings are to be “worn by all during the service except when an individual is addressing the  
16 congregation.” Dkt. 77-1, at 47. They explain that, “[i]f there are two or more speakers  
17 scheduled to address the congregation during the service, only one speaker at a time may remove  
18 their face covering.” *Id.* They further provide that “[i]f a speaker decides not to wear a  
19 face covering, it is recommended that a Plexiglas 3-sided barrier is used during the service.” *Id.*

20 The Governor, Secretary of Health, and Attorney General now move for dismissal of the  
21 claims asserted against them arguing that (1) the Plaintiff’s claims against rescinded hard  
22 attendance caps are moot, (2) the Plaintiff lacks standing to challenge the Religious  
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1 Organizations Requirements, and (3) the Eleventh Amendment bars claims against each of the  
2 remaining Defendants – Governor Inslee, Sec. Shah, and Attorney General Ferguson. Dkt. 76.

3 The Plaintiff opposes the motion, noting that its’ challenge to the 200-person cap for  
4 indoor worship services is “vindicated.” Dkt. 82. It argues that it does have standing to  
5 challenge the Religious Organizations Requirements and maintains that the Eleventh  
6 Amendment does not bar its claims. *Id.*

7 The moving Defendants filed a reply (Dkt. 84) and the motion is ripe for review.

## 8 **II. DISCUSSION**

### 9 **A. MOTION TO DISMISS STANDARD**

10 A complaint must be dismissed under Fed. R. Civ. P. 12(b)(1) if, considering the factual  
11 allegations in the light most favorable to the plaintiff, the action: (1) does not arise under the  
12 Constitution, laws, or treaties of the United States, or does not fall within one of the other  
13 enumerated categories of Article III, Section 2, of the Constitution; (2) is not a case or  
14 controversy within the meaning of the Constitution; or (3) is not one described by any  
15 jurisdictional statute. *Baker v. Carr*, 369 U.S. 186, 198 (1962). A federal court is presumed to  
16 lack subject matter jurisdiction until plaintiff establishes otherwise. *Kokkonen v. Guardian Life*  
17 *Ins. Co. of America*, 511 U.S. 375 (1994); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d  
18 1221, 1225 (9<sup>th</sup> Cir. 1989). Therefore, plaintiff bears the burden of proving the existence of  
19 subject matter jurisdiction. *Stock West*, at 1225.

20 A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter  
21 jurisdiction can be either a facial attack or a factual one. *Safe Air for Everyone v. Meyer*, 373  
22 F.3d 1035, 1039 (9<sup>th</sup> Cir. 2004). “In a facial attack, the challenger asserts that the allegations  
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1 contained in a complaint are insufficient on their face to invoke federal jurisdiction.” *Id.* The  
 2 truth of the complaint’s allegations is presumed. *Id.*

3 “[I]n a factual attack, the challenger disputes the truth of the allegations that, by  
 4 themselves, would otherwise invoke federal jurisdiction.” *Id.* “In resolving a factual attack on  
 5 jurisdiction, the district court may review evidence beyond the complaint without converting the  
 6 motion to dismiss into a motion for summary judgment.” *Id.* (citing *Savage v. Glendale Union*  
 7 *High Sch.*, 343 F.3d 1036, 1039 n. 2 (9th Cir.2003)). “Once the moving party has converted the  
 8 motion to dismiss into a factual motion by presenting affidavits or other evidence properly  
 9 brought before the court, the party opposing the motion must furnish affidavits or other evidence  
 10 necessary to satisfy its burden of establishing subject matter jurisdiction.” *Safe Air*, at 1039.  
 11 The court need not presume the truthfulness of the plaintiff’s allegations in a factual attack under  
 12 Rule 12(b)(1). *Id.*

### 13 **B. CHALLENGE TO HARD ATTENDANCE CAP FOR INDOOR SERVICES**

14 The Plaintiff’s claims relating to the hard attendance cap for indoor services should be  
 15 dismissed as moot. This requirement is no longer a mandatory provision of the Religious  
 16 Organizations Requirements; while the 25% building capacity requirement remains, it is now  
 17 only “recommended” that houses of worship have a hard cap on attendance to 200 people or less.

18 The Plaintiff argues that the restrictions have changed over time and so the cap could be  
 19 restated, making its claims not moot. “The repeal, amendment, or expiration of challenged  
 20 legislation is generally enough to render a case moot and appropriate for dismissal” unless the  
 21 government is “reasonably expected to reenact offending provisions.” *Bd. of Trustees of Glazing*  
 22 *Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1198 (9th Cir. 2019). The Plaintiff fails to  
 23 make any showing that the Governor is “reasonably expected to reenact” the hard attendance  
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1 caps for indoor services. Claims based on the hard attendance caps for indoor services should be  
2 dismissed as moot.

### 3 C. STANDING

4 “[N]o principle is more fundamental to the judiciary’s proper role in our system of  
5 government than the constitutional limitation of federal-court jurisdiction to actual cases or  
6 controversies. One element of the case-or-controversy requirement is that plaintiffs must  
7 establish that they have standing to sue.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408  
8 (2013)(*internal quotation marks and citations omitted*). “A plaintiff seeking to establish  
9 standing must show that: (1) he or she has suffered an injury in fact that is concrete and  
10 particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged  
11 conduct; and (3) the injury is likely to be redressed by a favorable court decision.” *W.*  
12 *Watersheds Project v. Grimm*, 921 F.3d 1141, 1146 (9th Cir. 2019).

13 The Defendants’ motion to dismiss the Plaintiff’s pre-enforcement case without prejudice  
14 (Dkt. 76) should be granted. The Plaintiff has failed to show that it faces a genuine threat of  
15 injury – that of imminent enforcement or prosecution.

16 In evaluating the genuineness of a claimed threat of prosecution, courts in the Ninth  
17 Circuit look to whether a plaintiff has (1) “articulated a concrete plan to violate the law in  
18 question,” (2) “whether the prosecuting authorities have communicated a specific warning or  
19 threat to initiate proceedings,” and (3) “the history of past prosecution or enforcement under the  
20 challenged statute.” *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1139 (9th Cir.  
21 2000).

22 Parties do not dispute that at least in regard to the requirement that only one person at a  
23 time remove their mask to address attendants, the Plaintiff has articulated a concrete plan to  
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1 violate the Religious Organizations Requirements. The Second Amended Complaint indicates  
2 that individuals conducting services do not wear masks. The first requirement under *Thomas* is  
3 met.

4 The Plaintiff has failed to show that “the prosecuting authorities have communicated a  
5 specific warning or threat to initiate proceedings,” the second *Thomas* requirement. The Second  
6 Amended Complaint alleges that Governor Inslee has emphasized that “individuals and entities  
7 that violate the restrictions in his emergency proclamations and reopening plan may face  
8 criminal or civil penalties” and his office “has publicly stated its intention to seek enforcement of  
9 the Governor’s proclamations and accompanying health regulations against worship or other  
10 religious services.” Dkt. 53, at 8. Where, as here, Defendants attack the factual validity of this  
11 allegation, the Court need not assume the truth of this assertion. *Safe Air*, at 109. The Plaintiff  
12 also points to the phone call and email from the Department of Health as evidence that the State  
13 intends to enforce the restrictions against it. The Plaintiff has failed to carry its burden. There is  
14 no evidence that a specific warning or threat to initiate proceedings has been made either in the  
15 phone call or the email. “When plaintiffs do not claim that they have ever been threatened with  
16 prosecution, that a prosecution is likely, or even that a prosecution is remotely possible, they do  
17 not allege a dispute susceptible to resolution by a federal court.” *Thomas*, at 1140. The  
18 Defendants have demonstrated that the Department of Health has taken all the action it intends to  
19 take with the Plaintiff. There is no evidence that the Governor or the Attorney General have  
20 issued a specific warning to threat to initiate proceedings against religious organizations for  
21 failure to comply with the Religious Organizations Restrictions. The second *Thomas*  
22 requirement has not been met.

Further, the Plaintiff has also failed to show that there has been a “the history of past prosecution or enforcement under the challenged statute,” the third *Thomas* requirement. The Second Amended Complaint points out that Attorney General Ferguson has taken some enforcement actions against business owners. Dkt. 53, at 8. The Plaintiff has failed to allege, much less show with evidence, that an enforcement action has been taken against a religious organization in the State of Washington. While there have been instances of enforcement actions in other states against religious organizations, the Plaintiff must show that there is a history in this state. The third *Thomas* requirement has not been met.

#### **D. CONCLUSION**

The Plaintiff’s “claimed injury- [its] fear of enforcement or prosecution-fails the constitutional component of the ripeness inquiry.” *Thomas*, at 1139. The Defendants’ motion to dismiss should be granted and the case dismissed without prejudice for lack of subject matter jurisdiction. The Court need not reach the Defendants’ additional grounds for dismissal brought under the Eleventh Amendment.


### **III. ORDER**

It is **ORDERED** that:

- Pursuant to Fed. R. Civ. P. 25(d), newly appointed Washington State Secretary of Health Umair A. Shah **IS SUBSTITUTED** for former Washington State Secretary of Health John Wiesman as a Defendant, and
- Defendants Washington State Governor Jay Inslee, Washington State Secretary of Health Umair A. Shah, and Attorney General Robert Ferguson’s Motion to Dismiss (Dkt. 76) **IS GRANTED**; and
- The claims asserted against them **ARE DISMISSED WITHOUT PREJUDICE**.

1 The Clerk is directed to send uncertified copies of this Order to all counsel of record and  
2 to any party appearing *pro se* at said party's last known address.

3 Dated this 19<sup>th</sup> day of February, 2021.

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5 ROBERT J. BRYAN  
6 United States District Judge  
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